No. 89-1834

In The

Supreme Court of the United States

October Term, 1989

D.T., a minor, by his legally appointed guardians, M.T. and K.T., as parents and legal guardians of D.T.; F.H., Jr., a minor, by his legally appointed guardians, F.H. and L.H., as parents and legal guardians of F.H., Jr.; P.M., a minor, by his legally appointed guardian, R.T., as parent and legal guardian of P.M.,

Petitioners,

vs.

INDEPENDENT SCHOOL DISTRICT NO. I-6 of Pawnee County, Oklahoma,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeal For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a violation of substantive due process arises from a sexual assault by a teacher occurring in connection with students' voluntary participation in a privately sponsored activity on private property during summer vacation, when an earlier investigation by local school officials could not substantiate rumors of sexual misconduct (but did not uncover a ten year old conviction in another state antedating the perpetrator's teaching career in both states)?

2. Whether a sexual assault by a teacher occurring in connection with the voluntary participation by students in a privately sponsored activity on private property during summer vacation involves state action by the school district when an earlier investigation by local school officials could not substantiate rumors of sexual misconduct by the teacher (but did not uncover a ten year old conviction in another state antedating the perpetrator's teaching career in both states)?

3. Whether a school district's objectively reasonable investigation of rumors of sexual misconduct by a teacher that finds no substance to the rumors (but fails to uncover a ten year old conviction in another state) constitutes an unconstitutional "policy" that is the "moving force" behind a sexual assault occurring in the course of voluntary participation by students in a privately sponsored activity on private property during summer vacation?

LIST OF PARTIES

Petitioners, listed only by their initials in the style of this case are: Daniel Tilley (D.T.), a minor child, and his natural parents, Michael Tilley (M.T.), and Kay Tilley (K.T); Floyd Hightower, Jr. (F.H., Jr.), a minor child, and his natural parents, Floyd Hightower (F.H.) and Linda Hightower (L.H.); and Paul Miller (P.M.), and his natural mother, Rebecca Taylor (R.T.).

Respondent is the Independent School District No. I-6 of Pawnee County, Oklahoma (also known as the Cleveland Public Schools). In their list of parties in the Petition for Writ of Certiorari, Petitioners have named the current members of the Respondent's School Board (Joseph Cole, Mathew Ringold, Allen Potter, John Giddens, and Donald Topping), but these individuals have never been "parties" to this litigation in either their individual or representative capacities.

These parties were the same on appeal to the United States Court of Appeals for the Tenth Circuit.

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STATEMENT OF THE CASE

In the summer of 1981, the Respondent, Independent School District No. I-6 of Pawnee County [hereinafter School District] hired a new teacher, Stephen Lee Epps. Mr. Epps was an experienced teacher and came highly recommended from his previous employers. From August, 1972 until June of 1977, Mr. Epps was a fourth and fifth grade elementary teacher in Lancaster, Texas. (Trial transcript, Vol. IV, pp. 495-496). In 1977, Mr. Epps voluntarily left Texas and came to Oklahoma, where he was employed by school districts in Drumright and Wann, Oklahoma, until hired for the position with the Terlton School of the Cleveland Public Schools. It is undisputed that Mr. Epps was hired pursuant to normal procedures, which included a review of his credentials as supplied by Oklahoma State University. (Trial transcript, Vol. I, pp. 75, 80-81; Vol. II, pp. 160-161). Under Oklahoma Law, an individual who has been convicted of a felony may not hold a teaching certificate. In hiring teachers, the school district relied upon the certification process, and did not specifically make independent inquiries regarding possible prior arrests or convictions. (Trial transcript, Vol. I, p. 76; Vol. II, pp. 111, 160; Vol. III, p. 445). There is no national clearing house by which to check for convictions occurring in other states. (Trial transcript, Vol. IV, p. 510).

In August, 1981 (after Epps had already been hired), the Superintendent, Dr. Charles Clayton received a phone call from a woman in Arizona (later identified as Diane Kelley), who claimed that Epps had tried to molest her son and that he had been fired from his teaching position in Texas (as related to her by her mother). Dr. Clayton

said he would look into it. (Trial transcript, Vol. I, pp. 114-118). A phone call to the Texas School District established that Epps had not been fired, but had resigned voluntarily. Dr. Clayton was informed that Epps was considered a good teacher by his Texas School and could have continued to work there had he so wished. (Trial transcript, Vol. II, pp. 119-124; Vol. III, pp. 494-497). Dr. Clayton also called Mr. Epps' former principal in Drumright, Oklahoma, who stated he had in fact recommended Epps for reemployment at his school, and that although he had heard some rumors, he could not substantiate them. (Trial transcript, Vol. II, p. 150).

Aware of the gravity of the allegation, Dr. Clayton contacted Mr. Daniels, the principal of Epps' school, and directed him both to confront Epps about the accusation and to watch Epps closely. (Trial transcript, Vol. II, p. 112; Vol. III, pp. 359-60). When confronted, Epps denied the accusation, denied being a homosexual, and suggested that the caller was angry with him for returning to Oklahoma instead of staying with her. (Trial transcript, Vol. III, pp. 377-381). Mr. Daniels did in fact observe Epps closely (including spontaneous visits to his classroom and watching his behavior at basketball games), but saw nothing unusual in his behavior with children. (Trial transcript, Vol. III, pp. 360-362). Mr. Daniels also filled out six semi-annual reports in which Epps was given high ratings. (Trial transcript, Vol. III, pp. 363-369; plaintiff's Exhibit 8).

Contrary to the assertion of Petitioners, Charlotte Johnson was not acting as "a representative of some parents" when she discussed Epps with Mr. Daniels in the fall of 1981. *See* Petition for Writ of Certiorari, p. 3.

Mrs. Johnson specifically testified that her conversation with Mr. Daniels related to "rumors" that she "had heard" that Epps was "gay or whatever." (Transcript, Vol. II, p. 216, ll. 9-10, 23-24). Mrs. Johnson related to Mr. Daniels no details which could be pursued or verified. (Trial transcript, Vol. III, pp. 450-451).

Petitioners also mention Debbie Hewitt, who in May of 1982 (i.e., towards the end of Epps' first year as a teacher at the Terlton School) asked Mr. Daniels about "rumors." Her exact testimony was as follows:

> I just told him [Mr. Daniels] that I had heard rumors and that Mr. Epps was wanting to spend some time with my son and I did not know if there was any substance to the rumors, and I couldn't imagine him being in the school system if he was, you know. And he said that he would find out what he could.

(Transcript, Vol. III, p. 354, ll. 11-16). Clearly, Mrs. Hewitt was *inquiring* about *rumors*; she definitely was not reporting an incident. Similarly, only rumors (and no details or substance) were all that ever came to the attention of Peggy Pruitt. (Transcript, Vol. II, p. 147).

Walter Potts, the school custodian, testified that he told Mr. Daniels what an unidentified worker had told him about Epps. Mr. Potts conducted no independent investigation of his own, and conveyed no specific information to Mr. Daniels other than the claim that Epps had been "run . . . out of Drumright . . . " (Trial transcript, Vol. II, p. 193, ll. 6-11; pp. 192-195). Dr. Clayton already established that Epps had not been "run out of Drumright" but had in fact been recommended for rehiring. (Trial transcript, Vol. II, pp. 150-151).

The whole question of "notice" as argued by petitioners reduces to a series of unsubstantiatable rumors circulating and recirculating during Epps' first year as a teacher with Terlton School. The only specific claims that could be verified turned out to be false. Epps taught at the Terlton School for the academic years 1981-1982, 1982-1983, 1983-1984, and during that period, nothing occurred suggesting there was any substance to the rumors that accompanied Epps' initial hiring. (Trial transcript, Vol. III, pp. 392, 454-455). No incidents were brought to the school board's attention during the years 1982-1983, or 1983-1984, although parents had ready access to school authorities. (Trial transcript, Vol. II, pp. 151-152).

When school ended in May, 1984, Epps' duties to the School District and authority as a teacher ceased, and would not resume for another three months, towards the end of August. (Trial transcript, Vol. III, pp. 467-468). In May, Epps received his final salary checks, which could be cashed immediately. (Trial transcript, Vol. III, pp. 402-403, 468). During the summer months, the school would have no direct authority over students; it never had authority over parents. (Trial transcript, Vol. III, p. 402). On June 13, 1984, (after school had let out for the year) Epps took three former students to sell candy at shopping centers in the cities of Sand Springs and Tulsa, Oklahoma, as a way to raise money for a privately sponsored basketball camp to be held that summer. Afterwards, Epps offered to take the students swimming at the house of a friend. Each of the students contacted his parents and obtained permission both to accompany Epps to his friend's house, and to spend the night with

him. During the night, Epps molested the children. Although tragic, these events occurred on private property, in connection with a private activity and during summer vacation at a time when Epps had no duties as a teacher and no authority over the children.

The lack of school involvement in the basketball camp cannot be overemphasized. The School District never sanctioned, sponsored, or approved any fund raising activities in connection with summer athletic camps for elementary students. However, outdoor facilities, such as a football field, have been used in connection with these privately sponsored camps. (*Id.*) *Several different camps* were available to students for the summer. Most of the evidence did not relate specifically to any one camp or to a camp in which the students were involved. For example, a fund raising basketball game was held on the outdoor court of the Terlton School in order to raise money to help students attend the camp of their choice (not any one particular camp). Fund raising was not a school sponsored activity, and Epps' participation in those activities was purely voluntary. (Trial transcript, Vol. IV, p. 400). No particular approval would be needed to use outdoor facilities, and in fact, these were commonly left open to the general public (including adults) as there was no public park in Terlton. (Trial transcript, Vol. III, pp. 459-460).

On March 4, 1985, the underlying action was filed in the United States District Court for the Northern District of Oklahoma. Both Epps and the School District were named as defendants. Claims were asserted on behalf of Petitioners and also their parents pursuant to 20 U.S.C. Section 1681 and 42 U.S.C. Section 1983. No service was

obtained upon Epps, and Petitioners' claim against Epps was dismissed by Order of June 17, 1986.

From the very inception of this lawsuit, the School District has contended that Petitioners do not have a claim for violation of constitutional rights under color of law based upon the events of June, 1984. By Order dated September 10, 1986 and filed October 23, 1986, the trial court dismissed Petitioners' claims pursuant to 20 U.S.C. Section 1681; dismissed the Petitioner's parent's claims pursuant to both 20 U.S.C. Section 1681 and 42 U.S.C. Section 1983; and dismissed Petitioners' claim for punitive damages. The only remaining claim was pursuant to 42 U.S.C. Section 1983.

Petitioners' claim was tried to a jury on October 19 through October 23, 1987. At the close of plaintiffs' evidence, the School District moved for a directed verdict. This Motion was renewed at the close of all evidence. A verdict was returned in favor of Petitioners. The School District moved for Judgment notwithstanding the verdict, which was denied.

The School District appealed the Entry of Judgment in favor of Petitioners. Specifically, the School District contended that there was no "State action" in the events of June, 1984, that Epps was not acting "under color of law" in June, 1984, that the School District did not have a policy of deliberate indifference or reckless disregard of Petitioners' rights in connection with its investigation of the rumors circulated regarding Epps in the fall of 1981, and that any policy of the School District was not the "moving force" behind the events of June, 1984. The United States Court of Appeals for the Tenth Circuit

agreed and reversed the Judgment of the trial court, holding it was error not to direct a verdict in favor of the School District or to grant its Motion for Judgment notwithstanding the verdict. *D.T. v. Independent School District*, 894 F.2d 1176, 1192-1194 (10th Cir. 1990). Petitioners did not seek a rehearing from the appellate Court, but instead applied to this Court for Certiorari.

REASONS FOR DENYING WRIT

I

WHETHER A VIOLATION OF SUBSTANTIVE DUE PROCESS ARISES FROM A SEXUAL ASSAULT BY A TEACHER OCCURRING IN CONNECTION WITH STUDENTS' VOLUNTARY PARTICIPATION IN A PRIVATELY SPONSORED ACTIVITY ON PRIVATE PROPERTY DURING SUMMER VACATION, WHEN AN EARLIER INVESTIGATION BY LOCAL SCHOOL OFFICIALS COULD NOT SUBSTANTIATE RUMORS OF SEXUAL MISCONDUCT (BUT DID NOT UNCOVER A TEN YEAR OLD CONVICTION IN ANOTHER STATE ANTEDATING THE PERPETRATOR'S TEACHING CAREER IN BOTH STATES)?

Contrary to the claim of Petitioners, this case does *not* "involv[e] child abuse in the public schools with substantial government involvement . . . " Petition for Writ of Certiorari at pp. 7-8. What this case does involve are serious questions of "state action" when the injury occurs off school premises during summer vacation in connection with an activity that is not school sponsored at a time when the perpetrator owed no duties to the School District and the School District had no authority over the students. Nor is this a case where, as Petitioners

suggest, a "felon-teacher" was imposed upon "defenseless students" by an indifferent and reckless school board. Instead, only after the events of June, 1984, had led to the arrest and conviction of Epps on charges of lewd molestation, did the School District become aware of Epps' prior conviction. (Trial transcript, Vol IV, p. 566).

The investigation that was given the rumors called to the attention of the School District was both reasonable and thorough. There was little specific information which could be verified, and that which could be verified proved to be false. As noted by the Tenth Circuit:

> [W]e must hold that the evidence in this case is simply insufficient to demonstrate that the School District's policy reflected a reckless disregard or deliberate indifference to the constitutional rights of the plaintiffs violated by Epps on June 13-14, 1984. It is by hindsight that the need to make inquiries of law enforcement agencies concerning an applicant's felony record rather than relying on the fact that a teacher convicted of a felony is not entitled to have a teaching certificate in the state of Oklahoma seems clear. Nothing done or undone by Dr. Clayton or principal Daniels, however, could give rise to deliberate indifference to the constitutional rights of the plaintiffs. "If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior*." *City of St. Louis v. Praprotnik*, 485 U.S. [112,] 126, 108 S. Ct. [915,] 925 [(1988)].

894 F.2d at 1193.

Furthermore, it is misleading to claim that this case involves "a compelling state interest in preventing abuse

in schools." *See* Petition for Writ of Certiorari at 8. The abuse did not occur in school.

The opinion handed down by the Tenth Circuit Court of Appeals is not in any way inconsistent with prior opinions of this Court or with opinions handed down by other Courts. Although Petitioners assert an inconsistency on page 8 of their Petition for Writ of Certiorari, only one of their four "questions" even suggests an "inconsistency" relevant to the facts of this case:

> Are *Stoneking [v. Bradford Area School District,* 882 F.2d 720 (3rd Cir. 1989)] and *Sowers [v. Bradford Area School District,* 694 F. Supp. 125 (W.D. Pa. 1988), Aff'd without opinion, 869 F.2d 591 (3rd Cir. 1989), vacated sub. nom. *Smith v. Sowers* ___ U.S. ___, 109 S. Ct. 1634 (1989). Aff'd on remand 887 F.2d 262 (3rd Cir. 1989) cert. denied ___ U.S. ___, 110 S. Ct. 840 (1990)] in conflict with the case at bar concerning state action with the deprivations off school property?

Petition for Writ of Certiorari at 11. Petitioner's first question (whether the state has a duty as to foster homes) is entirely irrelevant to this case. Similarly, their second question (regarding any similarity between foster homes and public schools) is irrelevant as the abuse did not occur in school. Finally, petitioners' suggestion that "*Stoneking II* [is] in conflict with *DeShaney [v. Winnebago County Department of Social Services,* 489 U.S. ___, 109 S. Ct. 998 (1989)]" is not supported by argument in the Petition. In fact, Petitioners' only citations to *Stoneking II* invoke that decision as authority for their position. *See* Petition for Writ of Certiorari at 21, 24, 26. *Stoneking* is consistent with *DeShaney,* and the opinion of the Tenth

Circuit is consistent with both. As this Court stated in *DeShaney*:

> But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as the limitation upon the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the state itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot be fairly extended to impose an affirmative obligation on the state to insure that those interests do not come to harm through other means . . . its purpose was to protect the people from the State, not to insure that the State protected them from each other.

109 S. Ct. at 1003 (citations omitted).

> As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

Id. at 1004. This Court also reemphasized that "the Due Process Clause of the Fourteenth Amendment, . . . as we have said many times, does not transform every tort committed by a State actor into a constitutional violation." *Id.* at 1007 (citations omitted).

The instant case does not even present a "tort committed by a State actor" because Epps was not acting "under color of law" in June, 1984. This Court has defined an action taken "under color of law" as "[m]isuse of power, possessed by virtue of state law and *made possible only because the wrong doer is clothed with the authority of state law.*" *United States v. Classic*, 313 U.S. 299,

326 (1941)(emphasis added). Epps did not misuse his power as a teacher, because he had none in June, 1984. The school year had ceased, and Epps' duties would not resume until the following August. Furthermore, taking Petitioners on a fund raising expedition and then, later, with parental permission, taking them swimming, and having them spend the night with him, were not actions "made possible only because [Epps was] clothed with the authority of State Law." Anyone could have offered to take the children to Sand Springs or Tulsa to raise funds; anyone could have offered to take the children swimming. *See Hughes v. Meyer*, 880 F.2d 967, 972 (7th Cir. 1989)(game warden is not acting "under color of law" when he does no more than any citizen could have done).

The analysis of "duty" provided by *DeShaney*, cannot support Petitioners' position.

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interest against harms inflicted by other means.

109 S. Ct. at 1006. (footnote omitted). The School District imposed absolutely no restraints upon Petitioners in June, 1984. The predicate "restraint of liberty" necessary to find an affirmative duty under *DeShaney* is totally absent in this case.

Petitioners suggest that the relevant question is how "the State *initially placed*" Petitioners. Petition for Writ of Certiorari at 12 (emphasis added). However, the School

District does not "place" anyone anywhere during summer vacation. The real issue is whether there was any exercise of state authority to force Petitioners into a situation which they were helpless to avoid. It was with their parents' permission that Petitioners accompanied Epps to Tulsa and Sand Springs to raise funds for a privately sponsored basketball camp; it was with parental permission that Petitioners accompanied Epps to Drumright to go swimming and later spent the night with him.

Petitioners suggest that they were "bonded to" Epps. Petition for Writ of Certiorari at p. 13. Despite the assertion of Petitioners, this "bonding" can only refer to precisely the sort of "special relationship" which this Court has rejected as relevant to determining whether an "affirmative duty" arises on the part of the state. *DeShaney*, 109 S. Ct. at 1004.

Petitioners admit that "the facts before this Court do not present a picture of total restraint." Petition for Writ of Certiorari at p. 14. However, the facts do not present a picture of *any* restraint. The School District did not knowingly "place a convicted sexual felon amongst these children." *See* Petition for Writ of Certiorari at 15. Epps' prior conviction was unknown until the abuse had already occurred.

Petitioners suggest that the Court impose "a narrow constitutional duty to diligently investigate notice of abuse in the schools." Petition for Writ of Certiorari at 15-16. However, that suggestion ignores the fact that there was an investigation which was both reasonable and thorough under the circumstances and given the nature of the rumors brought to the attention of the

School District. Nothing even approaching "deliberate indifference to substantial notice" occurred in the case presented to the Court. Petitioners in effect seek to hold the School District strictly liable because Epps' prior conviction was not uncovered. That failure speaks more to Epps' ability to suppress that information than to any lack of diligence by the School District. Petitioners thus seek to impose liability even without showing any negligence on the part of the School District, but even negligence is insufficient to state a cause of action under Section 1983.

In *Spann v. Tyler Independent School District*, 876 F.2d 437 (5th Cir. 1989) cert. denied ___ U.S. ___, 110 S. Ct. 847 (1990) the Fifth Circuit Court of Appeals held that a School District could not be held liable under Section 1983 for an allegedly inadequate investigation of reports of sexual abuse by a School bus driver committed during the course of his employment. Assaults on several different occasions were reported to the principal, who conducted an allegedly inadequate investigation. The facts of the instant case are even less favorable to Petitioners than those in *Spann*: Epps was not acting under color of law in June, 1984, nor was there a suggestion of previous assaults by Epps while a teacher in Terlton which were called to the attention of the School District.

Petitioners cite *Taylor by and through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987). Petition for Writ of Certiorari at p. 16. There the state had placed a child in custody of foster parents who abused her. Here, the School District did not "place" plaintiffs in a basketball camp or in Epps' home. Petitioners quote a passage stating that "it is time that the law give to these defenseless

children at least the same protection afforded adults who are imprisoned as the result of their own misdeeds." 818 F.2d at 797. That passage is consistent with the holding in *DeShaney* that the state's affirmative duty flows from the limitations upon individual liberty imposed by the state. In the instant case, there was no imposition or compulsion by the School District depriving them of the liberty to decline to participate in a private summer basketball camp, to decline to participate in fund raising activities, to decline to accompany Epps swimming, or to decline to stay over night with Epps.

On page 16 of their Petition for Writ of Certiorari, Petitioners suggest that "restraint of personal liberty" could be found first, because attendance at school is required by law. However, the law does not require attendance at summer basketball camps, participation in fund raising activities for privately sponsored camps, accompanying private individuals swimming, or staying the night in the homes of private individuals. Secondly, Petitioners assert "the state endowed Epps with a position of trust to control the children's very decision-making process which could have avoided the abuse." Again, Epps was in no position to make decisions for the children. They were under no obligation to respect his wishes with regards to attending summer camp, raising funds for a camp, going swimming, or staying the night.

This Court contrasted attendence of children at school with the incarceration of prisoners in *Ingraham v. Wright*, 430 U.S. 651 (1977):

> Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child

> is not physically restrained from leaving school during school hours; at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mis-treatment.

Id. at 670. There is no reason to reconsider the *Ingraham* holding, as suggested by Petitioners on page 11 of the Petition for Writ of Certiorari. The distinction between schools and prisons is perfectly consistent with the discussion in *Deshaney* that an "affirmative duty to protect" is a function of the limitations on liberty imposed by the state. 109 S. Ct. at 1006.

In summary, the Petition for Writ of Certiorari should be denied. By no stretch of the imagination (let alone a "fair attribution") can Epps' assault be attributed to the State. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Nothing the School District did (or did not do) deprived Petitioners of liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

II.

WHETHER A SEXUAL ASSAULT BY A TEACHER OCCURRING IN CONNECTION WITH THE VOLUNTARY PARTICIPATION BY STUDENTS IN A PRIVATELY SPONSORED ACTIVITY ON PRIVATE PROPERTY DURING SUMMER VACATION INVOLVES STATE ACTION BY THE SCHOOL DISTRICT WHEN AN EARLIER INVESTIGATION BY LOCAL SCHOOL OFFICIALS COULD NOT SUBSTANTIATE RUMORS OF SEXUAL MISCONDUCT BY THE TEACHER (BUT DID NOT UNCOVER A TEN YEAR OLD CONVICTION IN ANOTHER STATE ANTEDATING THE PERPETRATOR'S TEACHING CAREER IN BOTH STATES)?

An insurmountable obstacle to Petitioners' Section 1983 claim against the School District is the complete

absence of any "state action" in the events of June, 1984. To establish state action, "the complaining party must . . . show that 'there is a sufficiently close nexus between the State and the challenged action." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). Petitioners' injuries were inflicted in June, 1984, at the hands of Epps. When the nature of their claim is made clear, it is revealed that Petitioners actually seek impermissibly to hold the School District liable on a respondeat superior basis. However, the School District "cannot be held liable under Section 1983 on a *respondeat superior* theory."

Monell v. Department of Social Services of the City of New York, 463 U.S. 658, 691 (1978).

> The purpose of this requirement is to assure that consitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains. The importance of this assurance is evidence when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties.

Blum v. Yaretsky, 457 U.S. at 1004 (emphasis original). This Court also held "that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided some significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* (citations omitted). In the instant case, the School District exercised no "coercive power" causing the events of June, 1984, to occur. The School District did not do anything which even remotely suggests "encouragement" of those events.

Petitioners assert without citation that the Tenth Circuit held that the School District's involvement in the events of June 13, 1984, was merely "passive." Petition for Writ of Certiorari at p. 19. The Tenth Circuit did emphasize "the necessity of finding a direct causal connection between the municipal conduct (policy) and the constitutional deprivation." 894 F.2d at 1192, citing *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824-25 (1985). The appellate Court also required "that a consciously adopted 'policy' (here the established procedure of the School District in the investigation, hiring and supervision of teachers) must, in a causal sense, reflect deliberate indifference to the constitutional rights of [Petitioners.]" 894 F.2d at 1193.

> We hold that, as a matter of law, the evidence in the case was insufficient to establish that the School District's policy of investigating, hiring and supervising teachers was so wanting that it constituted deliberate indifference or reckless disregard for the constitutional rights of the plaintiffs.

894 F.2d at 1194. That conclusion was not error.

It is irrelevant whether the School District "placed [Epps] in a classroom and gym" and what authority Epps may have had over students in the classroom situation; the events of June, 1984, did not occur in a classroom. They did not even occur on school property, during the school year, or in connection with a school related event. Any "grant of authority" to Epps had terminated on the last day of school in the previous May. No new "grant of authority" would descend upon Epps until the following August.

It is misleading to say that the School District "*caused* notices and flyers to be sent home from school and approve the use of their facilities for summer basketball camps." Petition for Writ of Certiorari at p. 21. Students, often took home materials relating to a myriad of non-school related activities, including volunteer fire department meetings and water board meetings, as an effective means of communication in a small community. (Trial transcript, Vol. III, pp. 393-394).

Furthermore, whether the School District approved the use of facilities in connection with other summer basketball camps is irrelevant. The sole evidence in this connection focused upon a *girls'* basketball camp in Cleveland (Petitioners are all boys, and could not have attended that camp). Furthermore, the girls' camp would have already been held and over before the events of June 13, 1984. *See* Plaintiff's Trial Exhibit 4 (setting the dates for the camp as June 4 through June 8). The mere use of school facilities in connection with a camp Petitioners could not attend does not identify any action by the School District in connection with purely voluntary fund raising activities for a different privately sponsored camp, and even less with Petitioners' voluntary and permissive decision to accompany Epps swimming that afternoon and spend the night with him.

Petitioners cite *DeShaney*, where this Court concluded that the State had placed the child there in question in "no worse position than in which he would have been had it not acted at all." Petition for Writ of Certiorari at p. 20, citing *DeShaney*, 109 S. Ct. at 1006. In *DeShaney*, the state returned the child to his father's custody. In the instant case, Petitioners were not placed in Epps' care by

the state in connection with the events of June 13, 1984. Their association with him on that date was purely voluntary and by their own parents' permission. Any authority Epps had over Petitioners did not flow from the state, but from their own parents, and their own voluntary decision to accompany him.

Petitioners refer to "Judge Posner's 'snake pit' analogy . . . " Petition for Writ of Certiorari at p. 21, citing *Bowers v. DeVito*, 686 F.2d 616, 619 (7th Cir. 1982). In *Bowers*, plaintiff's decedent had been killed by an individual who had been diagnosed schizophrenic but released by physicians acting under a contract with a state mental health center. The Court upheld Judgment for the defendants, even though the perpetrator had killed another person with a knife five years prior to his most recent release.

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tort feasor as if it had thrown him into a snake pit. It is on this theory that state prison personnel are sometimes held liable under section 1983, for the violence of one prison inmate against another. (citation omitted). But, the defendants in this case did not place Ms. Bowers in a place or position of danger; they simply failed to adequately protect her, as a member of the public, from a dangerous man.

686 F.2d at 618. The Court noted that although plaintiff might have a claim under state tort law, she did not have one under 42 U.S.C. Section 1983 for deprivation of constitutional rights.

There is nothing even remotely analogous to the notice given to defendants in *Bowers* in the instant case. In *Bowers*, the defendants had themselves determined that the perpetrator was a schizophrenic. In the instant case, the rumors regarding Epps could not be substantiated but were in fact contradicted upon investigation. In *Bowers*, the perpetrator had previously murdered someone and had been again committed to the defendants. In the instant case, the School District had no actual knowledge of Epps' prior conviction (and, based on his Oklahoma Teachers' Certificate, had good reason to believe no prior conviction was possible). Nor did the School District have knowledge of any acts of sexual molestation committed by Epps during his tenure at the Terlton School before June, 1984. If Judgment for defendants was proper in *Bowers* (as Petitioners suggest by their citation to that case), then the necessity of Judgment in favor of the School District in the instant case cannot be disputed.

Petitioners quote *Stoneking*, 882 F.2d at 724, for the proposition that:

> The "person" alleged to have caused the underlying deprivation to the children's rights is the School District. Whether Epps was acting under color of law or was a state act, or would be material if Epps' private liability were the question. It is not. "Instead, the suit is against the School District, and they were incontestably acting under color of state law."

Petition for Writ of Certiorari at p. 21. The immediately preceding paragraph to that quoted by Petitioners states the basis for finding "state action":

> Unlike DeShaney's father, who is referred to throughout the *DeShaney* opinion as a private

> third-party, Wright was a School District employee subject to defendants' immediate control. In fact, many of Wright's interactions with Stoneking occurred in the course of his performance of his official responsibilities, such as during school-sponsored events and trips, and sometimes on school property.

Id. In contrast, Epps was not "subject to the immediate control" of the School District, nor did the assault "occur in the course of his official responsibilities." The "interactions" involved in *Stoneking* were described as follows:

> Stoneking's complaint alleged that Edward Wright, a School District employee who was the band director at Bradford High, used physical force, threats of reprisal, intimidation and coercion to sexually abuse and harass her and to force her to engage in various sexual acts beginning October, 1980, when she was a high school student, and continuing through Stoneking's sophomore, junior and senior years until her graduation in 1983, and thereafter until 1985. Defendants concede that some of these acts occurred in the band room at the high school and on trips for band functions, as well as in Wright's car and in his house while Stoneking babysat or after he gave her a music lesson.

Id. at 722. In contrast to this prolonged pattern of systematic abuse, no impropriety by Epps during his three years at Terlton School was called to the attention of the School District.

The actual holding in *Stoneking* provide an excellent contrast to the instant case demonstrating the School District's entitlement to Judgment in its favor. The Third Circuit held that Summary Judgment was properly granted to the superintendent of the School District,

because "the mere failure of supervisory officials to act or investigate cannot be the basis of liability." 882 F.2d at 730. The Court snoted that:

> Stoneking's claims against [the superintendent] amount to mere 'inaction and insensitivity' on his part. We cannot discern from the record any affirmative acts by [the superintendent] on which Stoneking can base a claim of toleration, condonation or encouragement of harassment by teachers which occurred in one of the various schools within his district.

Id. at 731 (citations omitted). In contrast, an action was allowed to go forward against the principal and assistant principal on the following basis:

> In sum, there is evidence in the record that between 1978 and 1982 [the principal and the assistant principal] received at least five complaints about sexual assaults of female students by teachers and staff members; that [the superintendent] was told about some of these complaints; that [the principal] recorded these and other allegations in a secret file at home rather than in the teachers' personnel files, which a jury could view as active concealment; that the defendants gave such teachers excellent performance evaluations, which a jury could view as communication by the defendants to the teachers that the conduct of which they were accused would not be considered to reflect negatively on them; and that [the principal and the assistant principal discouraged and/or intimidated students and parents from pursuing complaints, on one occasion by forcing a student to publicly recant her allegation.

882 F.2d at 728-729. The "five complaints" in *Stoneking* related to separate incidents of sexual abuse occurring at

the school, not, as in the instant case, vague and unverifiable rumors.

The Third Circuit was concerned that the actions of the principal and the assistant principal "amounted to a communication of condonation of the teacher's behavior." *Id.* at 731. The actions of the School District in the instant case were far superior to those of the superintendent in *Stoneking*, nevertheless, the Judgment in favor of the superintendent in *Stoneking* was held proper. The School District in the instant case did not ignore and condone ongoing sexual molestation, whereas that is exactly what the facts in *Stoneking* suggest. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (State must force or encourage private action). Petitioners are incorrect when they state that Epps was "under contract" to the School District in June, 1984, and that he received "checks in May, 1984, postdated for the summer." Petition for Writ of Certiorari at 22, 22 n. 10. The testimony was uncontradicted that Epps' contract with the School District was for 175 days of teaching and that although his checks were divided into twelve payments, the ones he received when he checked out in May were "cashable immediately." (Trial transcript, Vol. III, pp. 402-403, 468).

Petitioners allege that if Epps had "asked to take the children boating, Petitioners in turn would have been in a better position to exercise parental authority." Petition for Writ of Certiorari at p. 23. However, Petitioners were in an excellent position to exercise parental authority in connection with whether to accompany Epps swimming, or to spend the night with him at his house.

Petitioners cite *Sowers*, supra, and *Stoneking* for the proposition that "most abuse practiced takes place off school property." Petition for Writ of Certiorari at p. 24. In fact, both *Sowers* and *Stoneking* involved the same School District and the same teacher. *See* 694 F. Supp. at 126. In those cases, many acts of sexual molestation occurred during school, on school property, or in connection with school sponsored events. 882 F.2d at 722, 724, 728-729; *See also*, 694 F. Supp. at 127-128. In the instant case, Petitioners can cite to no analogous actions by Epps.

In summary, the comparison between this case and *Stoneking*, establishes that there was no state action of any form involved in the events of June, 1984. Therefore, the Petition for Writ of Certiorari should be denied.

III.

WHETHER A SCHOOL DISTRICT'S OBJECTIVELY REASONABLE INVESTIGATION OF RUMORS OF SEXUAL MISCONDUCT BY A TEACHER THAT FINDS NO SUBSTANCE TO THE RUMORS (BUT FAILS TO UNCOVER A TEN YEAR OLD CONVICTION IN ANOTHER STATE) CONSTITUTES AN UNCONSTITUTIONAL "POLICY" THAT IS THE "MOVING FORCE" BEHIND A SEXUAL ASSAULT OCCURRING IN THE COURSE OF VOLUNTARY PARTICIPATION BY STUDENTS IN A PRIVATELY SPONSORED ACTIVITY ON PRIVATE PROPERTY DURING SUMMER VACATION?

Petitioners begin their discussion under their third proposition by claiming that the Tenth Circuit held that "Petitioners must prove that responsible policy makers consciously 'decided' a policy of child abuse. This is an impossible submission, and overlooks the obvious fact

that the School District hired a sex offender." Petition for Writ of Certiorari at pp. 24-25.

The School District did not knowingly hire a sex offender; it hired an experienced teacher with good credentials. Furthermore, the Third Circuit Court of Appeals found allegations from which it might follow that the principal and assistant principal (but not the superintendent) did in fact actively condone and approve an ongoing series of sexual assaults by maintaining secret files of the incidents, discouraging reporting of other incidents, and humiliating at least one student who did attempt to complain. *Stoneking*, 882 F.2d at 728-729.

Petitioners cite *City of Canton, Ohio v. Harris*, 489 U.S. ___, 109 S. Ct. 1197 (1989). Petition for Writ of Certiorari at p. 25. There, this Court stated "that a municipality can be found liable under Section 1983 only where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under Section 1983." 109 S. Ct. at 1203 (emphasis original). At issue was an alleged deficiency in a city's training program regarding the determination of when a person in custody needed medical training.

> Moreover, for liability to attach in this circumstance, the identified deficiency in a city's training program must be closely related to the ultimate injury. Thus, in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs . . .
>
> . . . In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a Section 1983 plaintiff will be able to point to something the

> city "could have done" to prevent the unfortunate incident.

109 S. Ct. at 1206 (citations and footnote omitted). In the instant case, there is nothing whatsoever to suggest that any alleged inadequacy in the School District's investigation of the rumors regarding Epps in any way "actually caused" Epps to commit the assaults of June, 1984. In *Stoneking*, the active suppression and discouragement of complaints of specific sexual assaults committed on school property and in connection with school sponsored events could amount to an active condonation and appeal of those assaults. Nothing of that sort happened in the instant case.

It is decidedly not "given" that there is an equivalence between Diane Kelly's phone call in August, 1981, and the events that occurred at the police station in *Canton v. Harris*. *See* Petition for Writ of Certiorari at p. 27. In *Canton v. Harris*, written policy delegated to shift commanders responsibility for determining when a prisoner required medical treatment, but "testimony also suggested that Canton shift commanders were not provided with any special training (beyond first-aid training) to make a determination as to when to summon medical care for an injured detainee." 109 S. Ct. at 1201. "Mrs. Harris' notice of deficient medical care" consisted in her behavior when she was brought to the police station, and thus consisted of events occurring in the police station and in front of police officers. In contrast, the "Notice" in the instant case consisted of unverifiable rumors. The repetition of a rumor does not endow it with greater credibility. *See* Petition for Writ of Certiorari at p. 28.

Petitioners cite *Davidson v. Cannon*, 474 U.S. 344 (1986). Petition for Writ of Certiorari at p. 28. In that case, this Court concluded that "the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." 474 U.S. at 347, citing *Daniels v. Williams*, 474 U.S. 327 (1986). In *Davidson*, a prisoner sent a note to prison officials informing them of a threat by another prisoner who had also previously assaulted the inmate. Later, the inmate was attacked by the prisoner who had previously threatened him. The Court held that any lack of due care on the part of prison officials to take steps to protect the inmate was not of constitutional dimension.

The instant case presents an even weaker argument for liability under Section 1983 than *Davidson*. There was no lack of due care in the original investigation into Epps' background when he was hired, or in the investigation conducted pursuant to the rumors and the phone call of Diane Kelly.

In conclusion, the investigation conducted by the School District was objectively reasonable under the circumstances and given the information upon which it was expected to act. The School District did not ignore facts that were staring them in the face. It was not consciously indifferent to a threat that was readily apparent and obvious to anyone. Instead, Epps had a deep, dark secret that he kept hidden from the School District, from his previous employers in Wann and Drumright, Oklahoma, and from the School District in Lancaster, Texas. The fact that it remained hidden for ten years speaks to Epps' criminal cunning, and not to any conscious indifference

to Petitioners' constitutional rights on the part of the School District.

CONCLUSION

WHEREFORE, premises considered, the respondent, Independent School District No. I-6 of Pawnee County, Oklahoma, prays this Court to deny Petitioners' Petition for Writ of Certiorari. The facts as developed at trial demonstrate that Petitioners do not have a claim against the School District pursuant to 42 U.S.C. Section 1983 for deprivation of constitutional rights under color of law. The injury of which Petitioners complain did not occur during the school year, but during vacation, a time when the School District had no authority over Petitioners or their parents, and when Epps had no authority as a teacher. No policy of the school district reflected conscious indifference to Petitioners' constitutional rights. Any "policy" of the School District certainly did not cause Epps to injure Petitioners in June, 1984. Therefore, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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